In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1238

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This is a companion case to *National Labor Relations Board* v. *National Woodwork Manufacturers' Ass'n, et al.*, No. 1247, this Term, pending on the Board's petition for certiorari. The cases involve different but related portions of a single Board order and court of appeals judgment.

As the Board's petition in No. 1247 explains in greater detail, the applicable collective bargaining agreement forbade the employer to use pre-cut doors, and the union sought to enforce that provision by refusing to hang such doors for four contractors. The Board found that the contract provision itself was not prohibited by Section 8(e) of the Act[1] (the "hot

[1] The relevant statutory provisions are set forth at pp. 37–38 of the Board's petition.

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cargo" section); since its object was to preserve work for the employees covered by the agreement; and that the work stoppage against one of the contractors (Frouge) did not violate Section 8(b)(4)(B) (the "secondary boycott" section), since Frouge had control over the kind of doors he used and the union's action was designed merely to stop Frouge from violating the lawful contract provision forbidding the use of pre-cut doors. However, the Board found that the union's refusal to install pre-cut doors for the three other contractors did violate Section 8(b)(4)(B). The Board's reasoning was that, since these employers had already obligated themselves in their contracts with the project owners to install pre-cut doors, the refusal must have had a forbidden "secondary" object—compelling the owners to stop specifying such doors. 149 N.L.R.B. 646.

The court of appeals reversed the Board's order insofar as the Board had determined that the contract ban on pre-cut doors was not a violation of Section 8(e) (Pet. 34–35); the Board's petition in No. 1247 seeks review of that portion of the court's judgment. But the court sustained the Board's 8(b)(4)(B) findings in their entirety (Pet. 30–34), including the finding that the union's refusal to work for Frouge was not a violation of Section 8(b)(4)(B); the present petition seeks review of the judgment below insofar as it upheld that finding.

We agree with the court's conclusion that the strike against Frouge did not violate Section 8(b)(4)(B). The purpose of the strike was not to place pressure upon the project owners or any other third party; it was to preserve the job opportunities of Frouge's employees, who had traditionally performed the kind of work embodied in pre-cut doors. Since the dispute with Frouge was thus primary rather than secondary, the strike against Frouge was properly held not to offend the secondary-boycott provision.

We note, however, that this conclusion shares a common premise with the Board's argument in No. 1247 that the contract provision forbidding the use of pre-cut doors was lawful under Section 8(e). This premise is that a refusal to handle prefabricated materials which is motivated solely by a desire to retain for the contractor's employees work they have traditionally performed is not proscribed by the Act, because the union's real dispute is with the primary employer (the contractor) rather than with the manufacturer of the prefabricated materials or some other third party.[2] Since the issues raised in the present

[2] There is an exception where the contractor has no choice in the materials he uses, due to specifications in the contract. In a phase of the present case not before this Court, the Board and the court of appeals found, as noted, that the work stoppages against the contractors other than Frouge violated Section 8(b)(4)(B) because those contractors were required by their contracts with the project owners to install precut doors. The Board reasoned that the real dispute, therefore, was with the project owners—a third party.

petition and in the Board's petition in No. 1247 are thus, under our view, closely related, we do not oppose the granting of the present petition if the Court grants the Board's petition in No. 1247.

Respectfully submitted.

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